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No. 84-505

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

DONALD E. PERCY, et al.,
Petitioners,
v.
CAMEO CONVALESCENT CENTER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners feel that respondents' statement of the case contains a number of factual errors. For purpose of their

petition, however, and only for that purpose, they accept respondents' statement of facts as true.

SUMMARY OF ARGUMENT

The Court of Appeals' decision conflicts with Hudson v. Palmer, 104 S. Ct. 3194 (1984). Cameo's own description of petitioners' misconduct shows it was random, unauthorized, and in violation of established state procedures. Respondents take no issue with petitioners' assertion that there were suitable state postdeprivation remedies.

The trial court's failure to give a conspiracy instruction was not error because no actor caused a deprivation. Dennis v. Sparks, 449 U.S. 24 (1980), is not to the contrary. The deprivation there was the product of the conspiracy,

and the conspiracy was actionable even though the actor causing the deprivation was immune from liability. But a deprivation there was. Here, the jury found no actor caused a deprivation.

Petitioners have not waived their argument that Cameo was not entitled to a predeprivation hearing. Petitioners were unable to make that argument below because state law required such a hearing. Subsequently this Court ruled that such state law requirements do not divest state actors from their good faith immunity defense, which turns on whether it was clearly established under federal law that a prior hearing was required. At the least, then, this court should grant certiorari to remand for consideration in light of Davis v. Scherer, 104 S. Ct. 3012 (1984).

This Court has not retreated from the rule that corporations do not enjoy fourteenth amendment liberty interests for purposes of due process.

The dispensation from prior hearing requirements does not turn on whether a state legislature did dispense with them but whether it could. In any event, state law provides prompt, postdeprivation administrative hearings.

ARGUMENT

I. The Court Of Appeals' Decision Conflicts With Hudson v. Palmer

Note first that Cameo makes no argument that Wisconsin lacks adequate postdeprivation remedies. The adequacy of Wisconsin's postdeprivation remedies is conceded.

Rather, Cameo argues that petitioners' conduct was not "random and unauthorized" because their misconduct was part of an "officially sanctioned" enforcement procedure. In other words, since petitioners were clothed with color of law garb, the rule of Hudson v. Palmer, 104 S. Ct. 3194 (1984), does not apply.

Certainly it does apply. Cameo's own description of petitioners' conduct portrays lawlessness, defying every known required state procedure at each step of the way. First, Cameo staes that even though state law established SORL eligibility if there were five NOVs, petitioners conspired to place Cameo on the list when there were only three. Second, petitioners conspired to suspend Cameo's right to receive referrals on the basis of NOVs they knew

to be meritless under Wisconsin law. Third, petitioners were required to dismiss the NOVs because they were meritless but prosecuted them anyway. Fourth, petitioners conspired to place Cameo on the SORL despite its appeal, contrary to a state law forbidding such placement in the face of an appeal. Fifth, instead of removing Cameo from the SORL by an appropriate notation on the subsequent SORL, as required by established state procedure, petitioners never did so. Sixth, petitioners never officially removed Cameo from the SORL. Seventh, petitioners gave Cameo only one day to correct a host of NOVs. Eighth, petitioners did not follow Wisconsin law requiring a hearing within thirty days of Cameo's appeal from the NOVs and the POC. Ninth, all

this resulted from Senn's statement that she intended to screw Cameo.

If all those facts are true, as Cameo represents they are, petitioners' conduct was random and unauthorized.

Moreover, Cameo places too much emphasis on the phrase "random and unauthorized." It is enough that the conduct be "unauthorized" under established state procedure. In the verbiage of Parratt v. Taylor, 451 U.S. 527, 543 (1981), it was enough that "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." In the verbiage of Hudson v. Palmer, it was enough that the state actors engaged in "an unauthorized intentional" deprivation. 104 S. Ct. at 3204.

And Cameo admits here that the petitioners' "official conduct [was] not authorized by the state legislature." (Resps.' brief in opposition at 24.)

Not only must it be admitted that the alleged conduct was unauthorized, but Cameo's suggestion that it was part of an "official sanction" would repeal Hudson v. Palmer, where the tortious wrongs were done under the cloak of authority. Whether the individual officials themselves are "able to foresee a deprivation is simply of no consequence." Hudson v. Palmer, 104 S. Ct. at 3204.

Nor does this case come within Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). There, the state actor did not timely process an appeal. As a

result the plaintiff's cause of action was extinguished by operation of state law. Distinguishing Parratt v. Taylor, the Court said:

> Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law ... . Unlike the complainant in Parratt, Logan is challenging not the [state actor's] error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

Logan, 455 U.S. at 436. Here, Cameo does challenge the errors of the state actors and charges them with violating the established state procedures, while conceding that Wisconsin provides suitable postdeprivation remedies. The established procedures do not destroy Cameo's rights. Petitioners' alleged defiance of them works the destruction.

It is the intentionality of petitioners' alleged wrongs that especially triggers Hudson v. Palmer. In explaining why the rationale of Parratt v. Taylor included intentional misconduct, this Court said:

> Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent.

Hudson v. Palmer, 104 S. Ct. at 3203. Hence, a conspiratorial intent to deprive by state officials is the antithesis of the established state procedures, by which the availability of due process is measured.

Finally, Cameo states that whether petitioners engaged in random and unauthorized conduct has not been decided. Petitioners will accept this statement as true for purposes of

argument, without waiving their claim that the verdict exonerated them. But accepting the statement as true, petitioners were unable to make the Hudson v. Palmer argument because this Court had not yet decided it.

At best, then, Cameo's argument would warrant this Court to grant certiorari if only to remand to the Seventh Circuit for consideration in light of Hudson v. Palmer. See Beltran v. Myers, 451 U.S. 625 (1981).

II. The Failure To Give A Conspiracy Instruction Was Not Error

Petitioners claim that, because no one caused a deprivation, a conspriracy to deprive is not actionable and the failure to instruct on conspiracy, therefore, was not error.

Cameo now agrees that a conspiracy to deprive is not actionable without a resulting deprivation, but asserts there was a resulting deprivation. The problem with its argument is that the jury found no actor worked a deprivation.

Cameo relies on Dennis v. Sparks, 449 U.S. 24 (1980), to say that an action for conspiracy will lie even if no action lies for a deprivation. That misstates Dennis. At best it held an action for conspiracy lay because the deprivation was the product of the conspiracy, although the actor causing the deprivation could not be sued because of judicial immunity. But there was a deprivation as a result of the conspiracy. Here the jury found no actor, aside from immunity defenses, worked a deprivation.

There being no deprivation by any actor, the failure to instruct on conspiracy was not error. The Seventh Circuit's requirement of an instruction was error.

III. Cameo Did Not Have A Right To A Prior Hearing

Cameo argues that petitioners have waived this argument because it was not submitted below and because they submitted jury instructions allowing the jury to find infringement of a liberty interest.

Cameo is correct that petitioners did not raise this argument below. The reason is that neither they nor the courts below had the benefit of Davis v. Scherer, 104 S. Ct. 3012 (1984), which holds that good faith immunity is not lost for failure to comply with state

rules of procedure. Petitioners' burden at trial was to show that, despite a state rule requiring a prior hearing, they did not deprive because the placement on the SORL without a hearing was a clerical snafu. It is obvious the jury believed petitioners' version. With Davis v. Scherer, however, petitioners are not burdened with showing why they did not comply with state law. Again, at best, Cameo's point in this regard would warrant this Court to grant certiorari and remand for consideration in light of Davis v. Scherer.

Petitioners did submit proposed instructions on liberty interests. However, at that time noncorporate individuals were plaintiffs and Davis v. Scherer had not been decided.

The Court of Appeals rejected the district court's instructions on due process and specifically held that on remand the jury was to be charged that the denial of the state-required hearing was a denial of due process. The Court of Appeals' reformation of the due process instruction is one of the particular issues raised in this petition.

Cameo argues that First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), has eroded this Court's rule that corporations do not have liberty interests protectible by due process. But Bellotti did not reverse this Court's rule that corporations have no liberty interests within due process. It expressly refrained from holding that a corporation has an independent liberty interest, for purposes of the due

process clause, but permitted the corporation to assert the first amendment interests of others. Here the jury found no first amendment retaliation.

Cameo asserts that this Court's rule exempting state action from predeprivation hearings relates to legislative decisions, and that the Wisconsin legislature here has required a prior hearing. Further, it asserts that state law does not provide for a prompt postdeprivation hearing at the administrative level.

The right to dispense with a prior hearing does not turn on whether a state legislature did dispense with it. It turns on whether the state legislature could dispense with it.

State law does provide for a prompt administrative hearing. It must be held within thirty days of the request and the department must make its decision within ten days. Wis. Stats. sec. 50.04(4)(e) (1977). (Pet. app. at 115.)

CONCLUSION

It is respectfully submitted that this Court should grant the petition for a writ of certiorari.

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